

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-89-0062 WBS GGH P

vs.

MICHAEL L. MONTALVO,

Movant.

FINDINGS & RECOMMENDATIONS

Introduction and Summary

One might assume that after numerous appeals, and motions attacking his conviction, including an appeal from a denied § 2255 motion, movant (Montalvo) would be scratching the bottom of the barrel for cognizable ways to keep his case alive. In this case Montalvo asserts that the “habeas court [trial court adjudicating his § 2255 motion],” the court invoked by Montalvo, lacked jurisdiction to adjudicate the habeas motion because of an underlying jurisdictional defect in the trial of his case, i.e., the trial court lacked jurisdiction to adjudicate “hypothetical felony” violations without indictments or counts, as the conditions precedent to trigger application of § 848(c).

The result of this imaginative motion, as the result obtained in every post-conviction proceeding thus far, should be found adverse to Montalvo, and this Rule 60(b) motion

1 should be recognized for what it is – a successive petition over which this court has no  
2 jurisdiction.

3 Discussion

4 Background

5 The court incorporates its chronology of Montalvo proceedings set forth in the  
6 Findings and Recommendations issued August 17, 2000, in the first 28 U.S.C. § 2255 motion:

7 In the instant case, Montalvo was convicted on October 19, 1989. On January 10,  
8 1990, he was sentenced to life in prison. On October 16, 1991, Montalvo filed his direct appeal,  
9 Montalvo I. While this appeal was pending, Montalvo filed a coram nobis petition asking the  
10 district court to dismiss the indictment against him. This court construed the petition as a § 2255  
11 motion and dismissed it on grounds that the direct appeal was pending. Montalvo appealed this  
12 order, Montalvo II. On November 30, 1992, the Ninth Circuit dismissed Montalvo II.

13 On August 4, 1992, the Ninth Circuit affirmed Montalvo's conviction in  
14 Montalvo I and remanded for resolution of a discovery issue raised pursuant to United States v.  
15 Henthorn, 931 F.2d 29 (9th Cir. 1991). The Ninth Circuit also remanded for resentencing,  
16 finding that the district court was not sufficiently familiar with the facts of the case. On  
17 December 26, 1992, the district court found that the government's failure to examine the agents'  
18 personnel files was harmless error. On January 14, 1994, Montalvo was resentenced to life  
19 imprisonment. Montalvo appealed this sentence, Montalvo III.

20 On November 2, 1994, Montalvo filed a motion for a new trial in this court. On  
21 February 24, 1995, Montalvo withdrew this motion.

22 On December 30, 1994, Montalvo filed a motion to correct his sentence under  
23 Rule 35(a). The court denied the Rule 35 motion on February 1, 1995. When Montalvo  
24 appealed, the Ninth Circuit consolidated this appeal with Montalvo III. On January 3, 1996, the  
25 Ninth Circuit denied Montalvo III. The United States Supreme Court denied certiorari in  
26 Montalvo III on October 21, 1996.

On February 18, 1997, Montalvo filed two more Rule 35 motions. On July 2, 1997, Montalvo filed another Rule 35 motion. On September 26, 1997, Montalvo withdrew this last Rule 35 motion. On October 27, 1997, the district court denied the pending Rule 35 motions. On January 27, 1999, the Ninth Circuit rejected Montalvo's appeal (Montalvo IV) of the denial of these motions.

Montalvo filed the original § 2255 motion on October 24, 1997.<sup>1</sup> The motion proceeded on the 219 page amended motion filed December 16, 1998, and hundreds of pages of exhibits. In this first 28 U.S.C. § 2255 motion filed, Montalvo raised a plethora of issues, but after having his § 2255 motion denied, Montalvo appealed on only one ground, a jury unanimity issue, see United States v. Montalvo, 331 F.3d 1052 (9th Cir. 2003). The judgment of the district court was affirmed. Although raising many issues in his first § 2255 motion, Montalvo did not argue that the district court lacked jurisdiction over his criminal proceedings.

### Discussion

#### A. Montalvo Did Not Previously Attack the Subject Matter Jurisdiction of the Trial Court in His Initial § 2255 Motion

Despite the government's alternative argument acquiescence in Montalvo's having previously raised a subject matter jurisdiction issue in his first § 2255 motion, the fact of the matter is that no such issue was ever raised, and no such issue was ever ruled upon, in the first § 2255 motion. Even Montalvo does not argue that such an issue was expressly raised.

The undersigned has personally reviewed the operative § 2255 motion, the Second Amended Petition, filed December 16, 1998, and especially pages 63-98. Subject matter jurisdiction, either directly, or in words which would place any reasonable jurist on notice that subject matter jurisdiction had been raised, was not referenced. Moreover, this petition was filed by counsel, who would have known full well how to attack the subject matter jurisdiction of the

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<sup>1</sup> The provisions of the Antiterrorism and Effective Death Penalty Act apply to this § 2255 motion.

1 trial court proceedings, if such had been an object of the § 2255 motion.

2 Montalvo, in this second § 2255 motion, concedes that he did not directly raise the  
 3 issue. His rather weak argument is that “[f]our of Montalvo’s § 2255 motion issues this court  
 4 procedurally defaulted, in error, *should have alerted* the habeas court that the trial court and itself  
 5 lacked Article III subject-matter and original jurisdiction, i.e., the power to adjudicate a claim.”  
 6 Rule 60(b) Motion at 3. The issues that “should have alerted” the habeas court, and presumably  
 7 Montalvo’s lawyer as well, were jury instruction claims regarding predicate acts (felonies) with  
 8 Montalvo’s ultimate claim that the errors in instruction were structural errors. Montalvo’s last  
 9 described claim involved the constitutionality of the CCE statute. See description of the claims  
 10 in the Rule 60(b) Motion at 3-4. Of course, the analysis of constitutional or structural error in no  
 11 way implicates the subject matter jurisdiction of the court allegedly making the error. There was  
 12 not a hint that Montalvo was challenging the subject matter jurisdiction of the trial court.<sup>2</sup>

13 Even taking Montalvo’s argument at face value demonstrates its paucity. If the  
 14 jurisdiction issue had been raised – then it had been raised. Bringing a claim already raised  
 15 violates the successive petition bar of § 2255 as much as a claim not raised which should have  
 16 been. However, Montalvo thought so little of the purported jurisdictional issue, whether or not  
 17 the district court reached it, he completely failed to raise it on appeal. Montalvo can’t have it  
 18 both ways – that the jurisdiction issue was so patent that it should have been adjudicated sua  
 19 sponte, but it was also so hidden that even Montalvo and his lawyer did not recognize this critical  
 20 argument in the lower court, and forgot to raise it in the Court of Appeals.

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23 <sup>2</sup> Also, for the reasons set forth by the government, a reasonable jurist would not have  
 24 recognized any subject matter jurisdiction issue because there is no law that supports the  
 25 argument. At hearing, the court inquired of Montalvo’s counsel, if the jurisdictional issue was  
 26 such a winner why the motion to make a successive petition was not simply filed with the Court  
 of Appeals, in lieu of a circuitous and problematic Rule 60(b) process. Counsel’s substantive  
 silence spoke volumes – no motion was made with the Ninth Circuit because there was no merit  
 to the jurisdictional defect argument.

1 In sum, no subject matter jurisdiction issue was raised in the initial § 2255  
2 motion.

3 B. The Court Has No Jurisdiction To Review a Successive Petition On Its Merits

4 Montalvo believes that if he can have the court find that the court lacked  
5 jurisdiction over his first § 2255 motion because of a lack of jurisdiction during his trial, the  
6 entire conviction would ultimately have to be vacated. Montalvo entices the court to tackle the  
7 merits of his problematic claim. It is not really the jurisdiction of the § 2255 adjudication which  
8 he challenges, but the jurisdiction of the district court during his trial. This rather discernible trap  
9 has no merit. The court cannot begin to adjudicate Montalvo's contentions (which predictably  
10 lack merit) if this attack is in truth a successive petition wrapped in a Fed. R. Civ. P 60(b) rubric.  
11 This court has no jurisdiction to review a successive petition unless the Ninth Circuit permits the  
12 successive petition. See 28 U.S.C. § 2255; Cooper v. Calderon, 274 F.3d 1270, 1274 (9th Cir.  
13 2001) (§ 2254 petition); United States v. Allen, 157 F.3d 661, 668 (9th Cir. 1998).

14 Under Rule 60(b), a party may seek relief from judgment and to re-open his case  
15 in limited circumstances, "including fraud, mistake, and newly discovered evidence." Gonzalez  
16 v. Crosby, 545 U.S. 524, 528, 125 S. Ct. 2641, 2645-46 (2005). Rule 60(b)(4) applies where the  
17 [§ 2255] "judgment is void." Under Rule 60(b)(6), the catchall avenue by which petitioner also  
18 seeks to proceed to reopen his case, one must demonstrate "any... reason justifying relief from the  
19 operation of the judgment" in situations that are not addressed by the specific circumstances  
20 delineated in Rule 60(b)(1)-(5). Gonzalez v. Crosby, 545 U.S. 524, 528-529, 125 S. Ct. 2641,  
21 2646 (2005).

22 A purported Rule 60(b) motion seeking to reopen the judgment of an initial  
23 habeas petition brought pursuant to 28 U.S.C. § § 2254, 2255 is in essence a successive petition,  
24 under 28 U.S.C. § 2244(b) where it "*seeks to add a new ground for relief*," or "if it attacks the  
25 federal court's previous resolution of a claim on the merits..." Gonzalez, at 532, 125 S. Ct. at  
26 2648 [emphasis added]. "[A] 'claim' as used in § 2244(b) is an asserted federal basis for relief

1 from a state court's judgment of conviction." *Id.*, at 530, 125 S. Ct. at 2647.

2 Of course, this court, in habeas, had jurisdiction to adjudicate the first § 2255  
3 motion because the statute gives it such jurisdiction – even for the very purpose of determining  
4 whether the trial court lacked jurisdiction. Assertions of lack of jurisdiction in the underlying  
5 case are cognizable in a § 2255 motion. 28 U.S.C. § 2255; *United States v. Wilcox*, 640 F.2d  
6 970, 972 (9th Cir. 1981)<sup>3</sup>. If this were not the case, in a situation where a defendant had not  
7 raised the jurisdictional defect on direct appeal, there would be no way ever for the defect to be  
8 raised because under Montalvo's present *Catch 22* theory, the court adjudicating the first § 2255  
9 motion raising a lack of trial court jurisdiction would never have habeas jurisdiction to review  
10 the alleged defect. Clearly, this court had jurisdiction to review any charge of lack of trial court  
11 jurisdiction *in the first § 2255 motion*, if only Montalvo had decided to raise it at that time.  
12 Montalvo's present theory that his Rule 60(b) motion is appropriate because the first § 2255  
13 adjudication itself was inherently defective from a jurisdictional standpoint has no merit. His  
14 ultimate claim that the trial court lacked jurisdiction is "another claim," in the words of  
15 *Gonzales*, attacking his criminal judgment which could have, and should have, been brought in  
16 the first § 2255 motion.

17 Since the district court had clear jurisdiction to review allegations of subject  
18 matter jurisdiction defects in the first § 2255 motion, the issue becomes whether this court has  
19 jurisdiction to review such allegations in a second § 2255 motion without permission of the  
20 Ninth Circuit to do so. As discussed above, it does not, and this court may not reach the merits  
21 of Montalvo's jurisdictional-defect-in-the-indictment allegations.<sup>4</sup>

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24 <sup>3</sup> Of course, a lack of jurisdiction "to impose such sentence," and if the "judgment was  
25 rendered without jurisdiction," § 2255, refers to a lack of jurisdiction at any stage of the criminal  
26 proceedings which would nullify the judgment.

<sup>4</sup> The government's brief clearly and cogently disposes of the jurisdiction defect  
allegations; however, no ruling can be made on the merits herein.

1 Conclusion

2 Montalvo's second § 2255 motion, brought in the guise of a Fed. R. Civ. P. 60(b)  
3 motion, should be dismissed for lack of jurisdiction.

4 These findings and recommendations are submitted to the United States District  
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty  
6 days after being served with these findings and recommendations, any party may file written  
7 objections with the court and serve a copy on all parties. Such a document should be captioned  
8 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
9 shall be served and filed within ten days after service of the objections. The parties are advised  
10 that failure to file objections within the specified time may waive the right to appeal the District  
11 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

12 DATED: 3/23/07

/s/ Gregory G. Hollows

13 UNITED STATES MAGISTRATE JUDGE

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